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In the Supreme Court of the United States

Supreme Court, U. S.
FILED
APR 19 1978
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent State of California in Opposition

EVELLE J. YOUNGER
Attorney General
E. CLEMENT SHUTE, JR.
Assistant Attorney General
LEONARD M. SPERRY, JR.
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1346

Attorneys for Respondent State of California

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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OPINIONS BELOW

The opinions of the lower courts are adequately referenced in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does the Tahoe Regional Planning Compact have the effect of waiving the protection of the Eleventh Amendment when that compact does not in any reasonable manner indicate that the states intended to waive the Eleventh Amendment or that Congress intended to abrogate Eleventh Amendment immunities.[1]

STATEMENT OF THE CASE

California adopts and incorporates the statement of the case set forth in the opposition brief of the Tahoe Regional Planning Agency. It should be noted that California was a named party in the action filed by petitioners in the federal district court but California has never been served in that action. However, California was named and served in two of the other cases involved in the consolidated opinion of the Ninth Circuit Court of Appeals. *Jones v. Tahoe Regional Planning Agency* (United States Court of Appeals for the Ninth Circuit No. 76-1182) and *Layton-Tahoe Properties v. Tahoe Regional Planning Agency* (United States Court of Appeals for the Ninth Circuit No. 76-1608). The States of California and Nevada were dismissed from these actions by the Ninth Circuit. *Jacobson v. Tahoe Regional Planning Agcy.* (9th Cir. 1977) 566 F.2d 1353, 1361-1362. California has an interest in the outcome of the Petition to the extent that waiver of the Eleventh Amendment is an issue.

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1. The other issues which have been raised by petitioners will be addressed in the oppositions of the Tahoe Regional Planning Agency and the individual respondents.

ARGUMENT

I. THE ELEVENTH AMENDMENT HAS NOT BEEN WAIVED BY THE ADOPTION OR ACCEPTANCE OF THE TAHOE REGIONAL PLANNING COMPACT.

A. The Conclusion Reached by the Ninth Circuit Court of Appeals Is Correct.

Petitioners argue that the immunity from suit accorded by the Eleventh Amendment has been waived by the adoption and acceptance of the Tahoe Regional Planning Compact. Petition for Writ of Certiorari at pp. 23-25. This argument is premised on an attempt to analogize article VI(b) of the Tahoe Regional Planning Compact with certain provisions of the compact construed in *Petty v. Tennessee-Missouri Bridge Comm'n* (1959) 359 U.S. 275. The Ninth Circuit Court of Appeals rejected this contention, observing it to be "somewhat contrived". *Jacobson v. Tahoe Regional Planning Agcy.* (9th Cir. 1977) 566 F.2d 1353, 1362. We agree with the Court of Appeals and will demonstrate the invalidity of petitioners' argument.

California's position rests on a principle that is not in dispute. In *Edelman v. Jordan* (1973) 415 U.S. 651, the Court stated the following principle for determining whether an Eleventh Amendment waiver has occurred:

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction' ". *Id.* p. 673.

Petitioners agree that this is the controlling language. See Petition for Writ of Certiorari at p. 24. We will show that there are several other reasonable constructions of article VI(b), none of which lead to a waiver of the Eleventh Amendment.

In this regard article VI(b), with its almost passing reference to federal courts, provides as follows:

> "All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency

> and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada."

The Court of Appeals pointed to three possible interpretations of the section: First, when read with article III(a) it appears that article VI(b) operates only as a grant of state court jurisdiction over the Tahoe Regional Planning Agency (hereafter TRPA). *Jacobson, supra*, at p. 1362; the second and third possible meanings as noted by the Court of Appeals are acknowledgment of diversity jurisdiction or jurisdiction over suits by the TRPA against the United States under the Tucker Act. *Jacobson, supra*, at p. 1362, fn. 17. A fourth possibility is that the article confers jurisdiction on the federal courts in an action brought by a compacting state against the TRPA where the violation occurred in the other state. *People of St. of Cal. ex rel. Younger v. Tahoe Reg. P. Ag.* (9th Cir. 1975) 516 F.2d 215 (suit by California against the agency claiming violation of compact in regard to two proposed casinos in Nevada). A fifth possibility is that the article acknowledges federal jurisdiction where the agency initiates litigation in a federal court thereby waiving any Eleventh Amendment immunity by virtue of a general appearance. *Petty, supra*, at p. 276.

Petitioners offer a sixth possible construction in an attempt to fit within this Court's holding in *Petty*. Even

assuming that the proffered construction is reasonable, which we dispute, application of the *Edelman* principle precludes a conclusion that the Eleventh Amendment has been waived through the Tahoe Regional Planning Compact. That is, the fact that there are several reasonable constructions of article VI(b), none of which lead to a waiver, eliminates the possibility that petitioners' construction, which does lead to a waiver, is either dictated by the express language of the article or by overwhelming implication from the lack of other reasonable meanings.

Notwithstanding the inescapability of the foregoing conclusion, we will further point out why *Petty* is not controlling.

B. Petty v. Tennessee-Missouri Bridge Comm'n (1959) 359 U.S. 275 Is Not Controlling.

In *Petty* this Court concluded that a "sue and be sued" clause in a compact allowing two states to create an agency which would build and operate transportation facilities over and across a navigable river must be construed as a matter of federal law. That compact also contained a provision, added by Congress, which in relevant portion precluded any diminishment of federal court jurisdiction over navigable waters or commerce.[2] *Petty, supra,* at p. 277.

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2. While section 5 of the Tahoe Regional Planning Compact, added by Congress, is somewhat akin to the language added by Congress in the *Petty* compact, this Court in *Petty* did not rest its holding on that proviso alone. Rather, that proviso "in light" of the sue and be sued clause was held to preserve federal jurisdiction. *Petty, supra*, at p. 281. Moreover, unlike the *Petty* compact, section 5 of the Tahoe Regional Planning Compact makes no reference whatsoever to the federal courts. Finally, the Eleventh Amendment is part of the laws of the United States. To conclude that there has been a waiver of the Eleventh Amendment by a reservation of the applicability of the laws of the United States is to have adopted a circular argument. See Dissent of Justice Frankfurter in *Petty, supra,* at p. 288.

Construing these two provisions together, this Court concluded that the Eleventh Amendment immunity had been waived in a suit by the widow of an employee who had been killed while operating a ferryboat for the interstate agency.

There is no similarity between the compact involved in *Petty* and the Tahoe Regional Planning Compact. The latter compact contains only the indirect reference to the federal courts discussed previously. In no way can that be considered the equivalent of the express consent to sue and be sued as dealt with in the *Petty* compact. Further distinguishing *Petty*, article VII(f) states: "No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof." This is a clear statement by the compacting states of their intention not to waive Eleventh Amendment immunities.

Finally, the instant case is distinguishable from *Petty* for the same reasons that *Petty* was distinguished in *Edelman*. In that case this Court construed the Eleventh Amendment to prevent actions in federal court for money claims payable from a state treasury. *Edelman* also involved the question of waiver of Eleventh Amendment immunity and held that Illinois had not waived its immunity by participating in the federally initiated Social Security program. *Supra* at page 3 we pointed out that *Edelman* requires a strong showing that states intend to waive their immunity under the Eleventh Amendment.[3] More specifically, this Court, distinguishing *Petty*, spoke directly to the requirements for a waiver in the context of an interstate compact:

3. This Court also observed in *Edelman*:
"'[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'" *Id.* p. 673.

"Similarly, *Petty v. Tennessee-Missouri Bridge Comm'n, supra*, involved congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power 'to contract, to sue, and be sued in its own name.' *The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.*

"*But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent.* Thus respondent is not only precluded from relying on this Court's holding in *Employees*, but on this Court's holdings in *Parden* and *Petty* as well." *Id.* p. 672. (Emphasis added).

Thus, this Court concluded that Eleventh Amendment waivers can be found where there is consent by the participating states or where Congress intended to abrogate the immunity and the states, by their participation, had in effect consented to that abrogation. *Edelman* was distinguished from *Petty* on this ground since the Court concluded that Congressional authorization to sue the participating states was wholly absent.

Likewise in the Tahoe Regional Planning Compact, as we have pointed out, there is no indication of a waiver of the Eleventh Amendment either in the organic legislation enacted by the states or in the Congressional ratification thereof. Therefore, the case at bar presents the opposite circumstance of that presented in *Petty*. Instead it is like the situation presented in *Edelman*.

CONCLUSION

In summary, the principles of law governing the presence or absence of an Eleventh Amendment waiver have been established by this Court. The decision of the Court of Appeals correctly applied these principles and was also correct in asserting petitioners' argument to be "contrived". The specter of great uncertainty raised by petitioners simply does not exist as there is no conflict in the decisions regarding Eleventh Amendment waivers. Thus under the decided principles enunciated by this Court, the adoption and acceptance of the Tahoe Regional Planning Compact by the contracting states of California and Nevada did not result in a waiver of the Eleventh Amendment. There is no important question of federal law raised and California respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: April 18, 1978

EVELLE J. YOUNGER
Attorney General

E. CLEMENT SHUTE, JR.
Assistant Attorney General

LEONARD M. SPERRY, JR.
Deputy Attorney General

By E. CLEMENT SHUTE, JR.
Assistant Attorney General